

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
MARITIME COMMUNICATIONS/LAND	)	EB Docket No. 11-71
MOBILE, LLC	)	File No. EB-09-IH-1751
	)	FRN: 0013587779
Participant in Auction No. 61 and Licensee of Various)	
Authorizations in the Wireless Radio Services	)	Application File Nos.
	)	0004030479, 0004144435,
Applicant for Modification of Various Authorizations	)	0004193028, 0004193328,
in the Wireless Radio Services;	)	0004354053, 0004309872,
	)	0004310060, 0004314903,
Applicant with ENCANA OIL AND GAS (USA), INC.;	)	0004315013, 0004430505,
DUQUESNE LIGHT COMPANY; ET AL.	)	0004417199, 0004419431,
	)	0004422320, 0004422329,
For Commission Consent to the Assignment of Various	)	0004507921, 0004153701,
Authorizations in the Wireless Radio Services	)	0004526264, and 0004604962

To: Marlene H. Dortch, Secretary
Attn: The Honorable Richard L. Sippel, Chief Administrative Law Judge

PETITION TO STAY

Choctaw Telecommunications, LLC and Choctaw Holdings (hereinafter collectively “Choctaw”) seek grant of a stay of the above-captioned hearing pursuant to the four-factor test applied by both the Commission and the courts. As discussed in more detail below, each of the four factors is present in this case.

BACKGROUND

Maritime Communications/Land Mobile, LLC Debtor-in-Possession (“MCLM”) holds licenses for a number of site-based Automated Maritime Telecommunications Systems (“AMTS”) stations. MCLM also was the successful bidder for certain geographic AMTS licenses through Commission Auction No. 61.¹ The Wireless Telecommunications Bureau initiated an investigation into the applications, inquiring into the relationship of certain persons

¹ *Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd 6520, 6547 (2012) (“HDO”).

(Mr. and Mrs. DePriest) to MCLM as well as MCLM's conduct with regard to its Auction No. 61 applications.

On April 19, 2011, the Commission designated for hearing a series of issues relating to “whether [MCLM] is qualified to be and to remain a Commission licensee, *and as a consequence thereof*, whether any or all of its licenses should be revoked, and whether any or all of the applications to which Maritime is a party should be denied.”² In short, all of the questions whether MCLM's site-based AMTS licenses should be revoked and/or the pending applications should be denied flow from the fundamental question of whether MCLM has the necessary character qualifications to be and remain a Commission licensee.

On August 1, 2011, while the hearing was pending, MCLM filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Northern District of Mississippi (the “Bankruptcy Court”). On November 15, 2012, after a hearing, the Bankruptcy Court confirmed the Chapter 11 reorganization which called for the assignment of MCLM's licenses to Choctaw (the “Bankruptcy Plan”).

On January 23, 2013, MCLM and Choctaw filed applications with the FCC seeking approval to assign MCLM's licenses – including those in this hearing – to Choctaw. The Commission generally will not act on applications to assign or transfer licenses that are subject to a hearing involving the qualifications of the license holder.³ Nevertheless, decades ago, the Commission carved out an exception to this prohibition – the *Second Thursday* doctrine – in order to accommodate bankruptcy law and protect innocent creditors.⁴ Under this doctrine, the Commission typically will terminate any pending hearing and permit the licensee to assign its

² *Id.* at 6520 (emphasis added); *see also id.* at 6548. The specific MCLM authorizations and applications designated for hearing are appended to the *HDO*. *Id.* at 6553-54.

³ *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

⁴ *Second Thurs. Corp.*, 22 FCC 2d 515, *recon. granted in part*, 25 FCC 2d 112 (1970); *see also LaRose v. FCC*, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir. 1974).

licenses to a qualified third-party, if the following three factors are satisfied: (i) the licensee designated for hearing is in bankruptcy; (ii) the individual(s) charged with misconduct would have no part in the proposed future operations of the licensee; and (iii) the individual(s) charged with misconduct would derive little or no benefit from the transfer.⁵

In their pending application, Choctaw and MCLM seek *Second Thursday* and related relief to permit the licenses subject to this hearing to be assigned to Choctaw. Choctaw hereby seeks a stay of the hearing to maintain the *status quo* while the Commission considers whether to terminate the hearing under its long-standing *Second Thursday* doctrine. As discussed below, the four-factor test applied by the Commission and the courts in the stay context is satisfied here.

ARGUMENT

A stay of this hearing is warranted under the traditional four-factor test applied by the Commission and the courts. That test looks to (1) petitioner's likelihood of success on the merits, (2) irreparable injury to the petitioner, (3) harm to other parties, and (4) the public interest.⁶ Each of these factors strongly favors a stay of the hearing while the Commission considers the merits of Choctaw's request for *Second Thursday* relief.

I. CHOCTAW IS LIKELY TO SUCCEED ON THE MERITS

A. *Second Thursday* Relief is likely to be Granted

There is a strong likelihood that Choctaw will succeed on the merits of claim under *Second Thursday*. Indeed, each element of the *Second Thursday* is readily satisfied in this case.

To begin, there can be no dispute that the hearing relates to MCLM's qualifications to be and remain a Commission licensee.⁷ The express language and ordering of the issues designated for hearing make this point evident. Issue (h) states that Issues (a)-(g) relate to whether "MCLM

⁵ *Second Thurs.*, 22 FCC 2d at 516; *see also Second Thurs.*, 25 FCC 2d at 114-15.

⁶ *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (1958); *Brunson Commc'ns, Inc. v. RCN Telecom Servs., Inc.*, 15 FCC Rcd 12883, 12883-84 (CSB 2000).

⁷ *HDO*, 26 FCC Rcd at 6520.

is qualified to be and remain a Commission licensee.”⁸ Issues (i)-(j) relates to whether, in light of the qualification issues, pending transactions involving MCLM’s licenses should be approved or whether certain MCLM licenses should be revoked. Under the *Second Thursday* doctrine, the Commission will terminate such hearings and permit the licensee to assign its licenses to a qualified third-party, if the following three factors are satisfied: (i) the licensee designated for hearing is in bankruptcy; (ii) the individuals charged with misconduct would have no part in the proposed future operations of the licensee; and (iii) the individuals charged with misconduct would derive little or no benefit from the transfer.⁹ Each of these criteria is satisfied here.

1. MCLM Has Obtained Bankruptcy Protection

On August 1, 2011, while the hearing was pending, MCLM filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Bankruptcy Plan was approved by the Bankruptcy Court on November 15, 2012.¹⁰

2. The DePriests will have no Role with Choctaw

The Bankruptcy Plan calls for the assignment of MCLM’s licenses to Choctaw. The DePriests – the alleged wrongdoers identified in the HDO – have no role in Choctaw and will play no future role with respect to any of the licenses subject to the hearing, or any licenses currently held by MCLM. The pending application seeking to assign the MCLM licenses to Choctaw contains a declaration from Patrick Trammell, Manager of Choctaw, stating under penalty of perjury that the DePriests will have no future role with the licenses.

Moreover, during the bankruptcy hearing, the Bankruptcy Judge reviewed numerous exhibits, including the Choctaw proposal, and lengthy testimony. Although certainly not binding

⁸ HDO at 6548.

⁹ *Second Thurs.*, 22 FCC 2d at 516; *see also Second Thurs.*, 25 FCC 2d at 114-15.

¹⁰ *In re Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-DWH (N.D. Miss Bank. Ct., Nov. 15, 2012); *see also* Order Confirming Plan of Reorganization, *Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-DWH (Bank. N.D. Miss., Jan. 11, 2013).

on the Commission, the independent Bankruptcy Judge determined that it was “pretty undisputed as far as the proof that I’ve heard today” that the DePriests would have no role with Choctaw.¹¹

3. The DePriests Will Not Realize any Cognizable Benefit

The Bankruptcy Plan sets forth the parties – specifically the creditors – that will benefit from the proposed transaction. Mr. and Mrs. DePriest are not listed as creditors and will not receive any portion of the purchase price associated with the operation or sale of the licenses. Further, the Bankruptcy Plan confirmed by the Bankruptcy Court implements a liquidating agent who is responsible for ensuring that any funds are distributed to creditors in the manner set forth in the plan. Thus, the DePriests will not receive any direct benefit from approval of the instant transaction.

The only possible, albeit indirect, benefit that may accrue to the DePriests is the extinguishment of a personal loan guarantee provided by Mr. DePriest in the event creditors are paid in full under the Bankruptcy Plan. No party is releasing Mr. DePriest, however, from this guarantee. The Commission has previously determined that the elimination of potential secondary liability is an incidental benefit that does not preclude *Second Thursday* relief.¹² The Commission has concluded that the “minor benefit” associated with the elimination of secondary liability is generally “outweighed by the equitable considerations favoring innocent creditors.”¹³ The Bankruptcy Judge, in confirming the Bankruptcy Plan, echoed the Commission’s reasoning:

[Mr. DePriest] may be off the hook [for the guarantee], but are we to choose to punish legitimate creditors just so someone might get an indirect benefit? No. I agree with the witness who testified yesterday that said that’s a small issue. And if these creditors are

¹¹ Transcript of Record at 183, *in re Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-DWH (Bank. N.D. Miss., Nov. 15, 2012) (“Hearing Transcript”).

¹² See, e.g., *KOZN FM Stereo 99 LTD.*, 6 FCC Rcd 257, 257 (1991); *Second Thurs. Corp.*, 25 FCC 2d at 115; *Pyle Communications Of Beaumont, Inc.*, 4 FCC Rcd 8625, 8626 (1989).

¹³ See *Pyle*, 4 FCC Rcd at 8626.

paid, then they ought to get paid and they certainly shouldn't be punished.¹⁴

Based on the foregoing, the Commission is likely to grant *Second Thursday* relief which will obviate the need for the hearing.

B. In the Event Issue (g) Is Not Included in *Second Thursday* Relief, Alternative Relief Is Likely to Be Granted

During the bankruptcy hearing, it was alleged that Issue (g) could not be subsumed within *Second Thursday* relief because it relates to whether MCLM's site-based licenses are terminated and does not relate to MCLM's qualifications to be and remain a Commission licensee. This argument is belied by the express language of *HDO* itself. As noted above, in the very first sentence of *HDO* the Commission states:

[W]e commence a hearing proceeding before the Administrative Law Judge to determine ultimately whether [MCLM] is qualified to be and to remain a Commission licensee, *and as a consequence thereof*, whether any or all of its licenses should be revoked, and whether any or all of the applications to which [MCLM] is a party should be denied.¹⁵

In other words, the Commission itself recognizes a fundamental nexus between the questions of whether MCLM should lose its existing licenses and MCLM's character qualifications. This nexus is confirmed by the fact that Issue (h) expressly provides that all of the preceding issues, including Issue (g) relate to MCLM's qualifications to remain a licensee.¹⁶

Nevertheless, in an abundance of caution, Choctaw and MCLM sought waivers of Sections 1.955(a) and 80.49(a) in their assignment applications.¹⁷ The parties noted that in past cases involving bankruptcy or the *Second Thursday* doctrine, construction deadlines have been

¹⁴ Hearing Transcript at 186.

¹⁵ *HDO*, 26 FCC Rcd at 6520-21 (emphasis added).

¹⁶ *Id.* at 6548 ("To determine, *in light of the evidence adduced pursuant to the foregoing issues*, whether Maritime is qualified to be and remain a Commission licensee.") (emphasis added).

¹⁷ Choctaw also is filing concurrently a Motion for Summary Decision of Issue (g). If that motion is granted, there will be no need to act on the waiver request.

waived and extensions granted to the extent necessary to allow expired authorizations and permits to transfer to new, qualified applicants free from any potential cloud on them.¹⁸

The requested waivers are likely to be granted because, as set forth in the waiver petitions, there is good cause to waive any construction and operational requirements that might otherwise impair the ability of MCLM to transfer its licenses to Choctaw. A waiver is appropriate where conduct is covered by the Commission's rules but there are sound public policy reasons to waive compliance in a particular case.¹⁹ Pursuant to 1.925 of the Commission's rules, a waiver is appropriate if, due to unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest.²⁰ Here, enforcement of various construction and operational requirements at issue in the hearing may result in MCLM being unable to transfer certain licenses to Choctaw as contemplated by the Bankruptcy Court. Such a result would be inequitable because it would punish innocent creditors and contrary to the public interest because it would frustrate bankruptcy law.

Moreover, a waiver of the permanent discontinuance requirement is appropriate because the Commission has never defined what constitutes permanent discontinuance in the context of the Automated Maritime Telecommunications System ("AMTS") stations. It would be both inequitable and contrary to *Trinity Broadcasting* and *Fox Television Stations* to enforce any such rule against MCLM without prior notice.²¹ In *Trinity Broadcasting*, the court reversed the Commission's decision to deny a television license renewal application on the grounds that the

¹⁸ Public Interest Statement at 10-12.

¹⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Pursuant to Section 1.3, the Commission may waive a provision of its rules for "good cause shown." 47 C.F.R. § 1.3.

²⁰ 47 C.F.R. § 1.925.

²¹ *Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000); *FCC v. Fox Television Stations Inc.*, 132 S. Ct. 2307, 2317 (2012).

applicant did not have adequate notice as to how the Commission was interpreting its minority preference regulations.²² The court explained that:

Because “[d]ue process requires that parties receive fair notice before being deprived of property,” we have repeatedly held that “[i]n the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.”²³

Thus, the court ruled that the Commission may deprive a regulated entity of a license only if:

[B]y reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform. . . .²⁴

The Supreme Court recently reconfirmed these fundamental due process principles in *Fox Television Stations*. There the Court noted:

[A] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. This requirement of clarity in regulation is essential to the protections provided by the *Due Process Clause of the Fifth Amendment*. It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are

²² *Trinity Broad.*, 211 F.3d at 628.

²³ *Id.* (alterations in original) (quoting *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (“*GE*”)).

²⁴ *Id.* at 628 (quoting *GE*, 53 F.3d at 1329) (internal quotation marks omitted).

necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.²⁵

For the foregoing reasons, the Commission is likely to waive its construction and permanent discontinuance rules to the extent necessary to allow for the assignment of all MCLM's licenses to Choctaw pursuant to the *Second Thursday* doctrine.

II. CHOCTAW AND OTHER INNOCENT CREDITORS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

The viability of the Bankruptcy Plan approved by the Bankruptcy Court is premised on quickly assigning MCLM's licenses and assets to Choctaw. Further, in order to repay innocent creditors, Choctaw will be selling a number of the MCLM licenses. A number of transactions remain pending that could provide substantial funds to repay creditors, but the transactions currently are held-up by the pending hearing. The hearing process also would prevent Choctaw from negotiating transactions that may be necessary to generate funds for creditor repayment.

Moreover, Choctaw is comprised of creditors seeking to get re-paid pursuant to the Bankruptcy Plan. There is no guarantee that they will be re-paid in full. If the hearing is not stayed, Choctaw will be forced to make additional expenditures in a costly and labor-intensive hearing, which would further penalize the innocent creditors and would be a significant distraction from the reorganization of the former MCLM.

III. THE OTHER PARTIES TO THE HEARING WILL NOT BE SIGNIFICANTLY HARMED BY A STAY

Grant of the requested stay would not significantly harm any party. To the contrary, grant of the stay would preserve the resources of all parties while the Commission reviews the *Second Thursday* showing and related waiver requests. Absent a waiver, the parties would expend considerable resources on matters that could be mooted by Commission action.

²⁵ *Fox Television*, 132 S.Ct. at 2317 (citations and internal quotation marks omitted).

IV. THE PUBLIC INTEREST WOULD BE SERVED BY GRANT OF A STAY

The requested relief is consistent with the public interest. First, a stay of the hearing is consistent with the need to accommodate bankruptcy law and protect innocent creditors.²⁶ In this regard, hearings historically have been stayed while the Commission considers applications seeking *Second Thursday* relief.²⁷

Second, the public interest would be served by a stay because it would conserve scarce resources. Neither the Commission nor the bankrupt MCLM would be required to expend resources on a hearing that could be rendered moot by grant of the pending applications seeking *Second Thursday* relief.

CONCLUSION

For the foregoing reasons, the Presiding Judge should stay the hearing pending Commission resolution of the pending applications pursuant to the *Second Thursday* doctrine.

Respectfully submitted,

CHOCTAW TELECOMMUNICATIONS, LLC
CHOCTAW HOLDINGS

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January 23, 2013

²⁶ *Second Thurs. Corp.*, 22 FCC 2d 515, *recon. granted in part*, 25 FCC 2d 112 (1970); *LaRose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974).

²⁷ *See, e.g., MobileMedia Corp.*, 12 FCC Rcd 7927, 7931-32 (1997) (overturning ALJ's denial of a stay); *MobileMedia Corp.*, 13 FCC Rcd 14770, 14770 (1998) (extending a stay pending action on a *Second Thursday* showing); *Oyate, Inc.*, 3 FCC Rcd 3940, 3940 (1988).

DECLARATION

I, Patrick Trammell, hereby declare under penalty of perjury that the foregoing Motion for Intervention was prepared under my direction and that all factual statements and representations contained therein are true and correct to the best of my knowledge.


Patrick Trammell

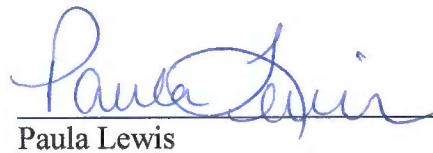
Dated: January 21, 2013

CERTIFICATE OF SERVICE

I, Paula Lewis, do hereby certify that on this 23rd day of January 2013, the foregoing Petition to Stay was served by email and first class mail, postage prepaid, on the following persons:

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Paula Lewis

* Also served by hand delivery.